Caught in the Act: The Case for Organisational Corporate Criminal Liability for Banks and Financial Institutions

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Events like the Global Financial Crisis, the bank bill swap reference rate scandal and the Royal Commission into Misconduct in Banking, Superannuation and Financial Services have brought into sharp focus the ability to criminally punish banks and financial institutions for corporate wrongdoing. This article explores the methods by which criminal liability can currently be imposed on a bank or financial institution and ultimately proposes that the theory of organisational liability is the most appropriate method through which such liability should be imposed. Such an approach is intended to finally hold banks and financial institutions accountable for their criminal conduct.

I. Introduction

There is broad agreement among policy-makers and the international community that a corporation is capable of being sanctioned under civil and administrative laws.[1] However, the capability to charge a corporation as a legal entity with a crime is a far more quarrelsome and multifaceted matter.[2] No statement better encapsulates this struggle than that of Professor Fisse who observed that the "attribution of criminal liability to corporations is an intractable subject, indeed, it is one of the blackest holes in criminal law".[3] Therefore, it comes as no surprise that the debate around whether a corporation can be held criminally liable has been ongoing for centuries.[4] It remains a provocative subject,[5] with the current debate displaying a mounting appreciation of the idiosyncratic nature of corporate vis-à-vis individual, criminality.[6]

This debate as it relates to banks and financial institutions has been brought into sharp focus due to a series of events that have occurred over the past decade and a half. Such renewed emphasis began with the occurrence of the Global Financial Crisis (GFC), which brought public attention to the issues of corporate governance and corporate integrity, especially the failures to curb excessive risk-taking.[7]

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[1] Olivia Dixon, "Corporate Criminal Liability: The Influence of Corporate Culture" (Sydney Law School, Legal Studies Research Paper No 17/14, University of Sydney, 2017) 1.

[2] Dixon, n 1.

[3] Brent Fisse, "The Attribution of Criminal Liability to Corporations: A Statutory Model" (1991) 13(3) *Sydney Law Review* 277.

[4] Samuel Walpole, "Criminal Responsibility as a Distinctive form of Corporate Regulation" (2020) 25 *Australian Journal of Corporate Law* 235.

[5] ALRC, *Corporate Criminal Responsibility*, Final Report No 136 (2020) Ch 4 (123–151), 123.

[6] Samuel Walpole and Matt Corrigan, "Fighting the System: New Approaches to Addressing Systematic Corporate Misconduct" (2021) 43(4) *Sydney Law Review* 489, 490.

[7] Vicky Comino, "'Corporate Culture' Is the 'New Black – Its Possibilities and Limits as a Regulatory Mechanism for Corporations and Financial Institutions?" (2021) 14(1) *University of New South Wales Law Journal* 295.

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The GFC was arguably the result of chronic lapses of the standards and failures of core values which restrained individuals from acting in their own self-interest to the detriment of the public interest.[8]

Hence, most of the criticism is directed towards the *corporate culture* of banks and financial institutions, which allowed and/or enabled such behaviour to occur.[9] The crises of the GFC led to a loss of faith in the traditional regulatory regime used to regulate financial markets.[10] The failure of successful criminal prosecutions against banks and financial institutions and their senior management from the events of the GFC led to a significant loss of trust in financial and banking institutions, and resulted in public confidence in regulators being undermined.[11]

In Australia, this *loss of faith* has been compounded by further events, such as the alleged rigging of the bank bill swap reference rate,[12] and the findings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services ("Hayne Royal Commission").[13] The Hayne Royal Commission found that the majority of instances of misconduct that occurred in banks and financial institutions were a result of *poor culture*–greed and short-term financial incentives had trumped the respect for the law and the customer.[14] These events demonstrate that such behaviour is a serious social problem and one which must be addressed.[15] Due to the size and power of banks and financial institutions, such misconduct often wreaks extreme mayhem which devastates many lives,[16] as well as causing systemic long-term financial harm to society.[17]

Events like the above, embolden arguments for banks and financial institutions to be capable of being criminally liable for their behaviour. Those in favour of such liability being imposed point to the associated stigma of a criminal conviction as being the only effective way to deter corporate malfeasance.[18] Those against, argue that the civil liability regime is a more appropriate way in which to impose sufficient penalties as the imposition of criminal liability is inappropriate in circumstances where a corporation cannot be imprisoned.[19] However, traditional approaches to corporate responsibility do not easily accommodate how banks and financial institutions act and omit to act, such as "collective decision-making, computer programs, systems of conduct, patterns of behaviour, policies, procedures, and culture".[20] Therefore, despite the broad societal condemnation of banks and financial institutions and the harms they inflict by engaging in corporate malfeasance, an effective and appropriate criminal legal response to such conduct has been largely missing.[21] In this regard, current approaches to imposing liability and accountability on banks and financial institutions, including the Banking Executive Accountability Regime (BEAR)[22] model and the statutory models (primarily Pt 2.5 of the *Criminal Code*

[8] Tracey Mylecharane, "It's about the BEAR" (2018) 97(7) *Law Institute Journal* 28, 29.

[9] Roman Tomasic, "Exploring the Limits of Corporate Culture as a Regulatory Tool – The Case of Financial Institutions" (2017) 32(2) *Australian Journal of Corporate Law* 196, 197.

[10] Tomasic, n 9, 196.

[11] Tomasic, n 9, 196; Comino, n 7, 297.

[12] Vicky Comino, "The GFC and Beyond--How Do We Deal with Corporate Misconduct?" (2018) 1 *Journal of Business Law* 15.

[13] Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report* (2018).

[14] Comino, n 7, 297.

[15] Ronald Kramer, "Criminologists and the Social Movement Against Corporate Crime" (1989) 16(2) *Social Justice* 146.

[16] Gerald Acquaah-Gaisie, "Corporate Crimes: Criminal Intent and Just Restitution" (2001) 13 *Australian Journal of Corporate Law* 219, 220.

[17] Penny Crofts, "Three Recent Royal Commissions: The Failure to Prevent Harms and Attributions of Organisational Liability" (2020) 42(4) *Sydney Law Review* 395, 396.

[18] Dixon, n 1, 1.

[19] Daniel Fischel and Alan O Sykes, "Corporate Crime" (1996) 25(2) *The Journal of Legal Studies* 319, 321.

[20] Walpole and Corrigan, n 6, 490.

[21] Crofts, n 17, 396.

[22] Anticipated to soon become the Financial Accountability Regime (*FAR*): *see Financial Accountability Regime Bill 2022* (Cth).

Act 1995 (Cth) (*Criminal Code*)) have proven to be insufficient to appropriately deal with the criminal conduct which has occurred within banks and financial institutions.

As can be seen by the GFC and the Hayne Royal Commission, the concept of *corporate culture* has been said to play a critical role in enabling criminality in banks and financial institutions to occur. These findings strengthen arguments for a new form of corporate criminal liability to be imposed on banks and financial institutions, one of *organisational corporate criminal liability* (*organisational liability*).[23] Such a method of liability differs from the *attributive* models of liability,[24] in that it does not rely upon either acts or liability being attributed to the corporation from or on behalf of, a natural person, but instead holds the corporation directly liable for the wrongdoing in its own right.[25] While the approach advocated by the Australian Law Reform Commission (ALRC) being a proposed model of imposing criminal liability where corporations engage in "systems of conduct or patterns of behaviour" that repeatedly breach the law is a step in the right direction,[26] it is inadequate to address criminality in "complex and devolved corporate structures",[27] which large banks and financial institutions are.

The purpose of this article is to assess the current state of the law in Australia concerning the imposition of criminal liability on banks and financial institutions and to propose further reforms for the imposition of criminal liability which are derived from the theory of organisational liability. The first part of this article summarises the traditional approach of imposing criminal liability on corporations, being the models of attributive criminal liability, including their deficiencies. This article then addresses the theories of Organisational Liability and the case for and against the adoption of such a methodology as the base theory by which corporate criminal liability should be imposed. Consideration is then given to the current statutory and regulatory frameworks which attempt to either impose criminal liability on or otherwise regulate, banks and financial institutions by imposing regulatory and accountability frameworks on their senior executives.

Attention is then turned towards proposed reforms to the imposition of corporate criminal liability on banks and financial institutions. Ultimately, it will be seen that a form of organisational liability which is based on an evaluation of the corporate culture is the most appropriate methodology by which banks and financial institutions should be found criminally responsible for their actions. It is to be preferred over the traditional models of attribution of corporate criminal liability. This is especially the case where individuals are becoming more and more removed from the decision-making process, as smart contracts, automated processes and artificial intelligence (AI) become more prevalent and are being integrated into the decision-making positions within banks and financial institutions.

II. Attributive Models of Corporate Criminal Liability

While it is recognised that corporate crimes are capable of being committed, and while there is little debate about the importance of stringent corporation regulation, the question that the common law has struggled with is whether a corporation can actually be guilty of a crime.[28] There have been conflicting views as to the proper place or proper individual, to which the requisite mens rea should be placed.[29] Such a debate can be conceptualised as being really whether a:

[23] James McConvill and Mirko Bagaric, "Criminal Responsibility Based on Complicity among Corporate Officers" (2004) 16 *Australian Journal of Corporate Law* 3.

[24] That is, the knowledge and intention of the corporation's employees and agents are to be attributed to the corporation itself: Elise Bant and Jeannie Marie Paterson, "Systems of Misconduct: Corporate Culpability and Statutory Unconscionability" (2021) 15 *Journal of Equity* 63, 72.

[25] Bant and Paterson, n 24, 72.

[26] Elise Bant, "Culpable Corporate Minds" (2021) 48(2) *University of Western Australia Law Review* 352, 384.

[27] Bant and Paterson, n 24, 64.

[28] Walpole, n 4, 236.

[29] Dixon, n 1, 2.

> "'corporation … [is] truly an entity that has the capacity for culpable conduct' or whether 'corporate personality [is] a fiction, so that all propositions about corporations are necessarily reducible to propositions about individual members'".[30]

The difficulty is that while in theory, a corporation is a separate legal entity, in practice it is made up of a team of individuals who exercise management and control of the corporation, being the company's officers, known as the *brain* of the company.[31] Models of corporate criminal liability vary between jurisdictions depending on where the relevant jurisdiction places the mens rea. The "traditional/nominalist" approach (which is based on civil law) espouses the view that the idea that a corporation can act on its own is completely fictitious and that the actions of the corporation are definable by reference to the behaviour of the corporation's individual members.[32] In contrast, the common law approach applies principles of vicarious liability or what is known as the identification theory.[33] Both of these concepts are methods of attribution.[34]

There are various issues with the many methods of attribution which impose criminal liability under the common law. An overriding criticism of the attributive models of liability is that they do not recognise the role that the corporation itself plays in moulding the behaviours of the individuals who work within it.[35] They are also said to be "woefully inadequate when faced with complex and devolved corporate structures",[36] which is exactly what banks and financial institutions (especially large ones) are.

A. Vicarious Liability

Vicarious liability operates as a method of attribution by holding a corporation (as the principal) responsible for the acts of its agents (such as employees).[37] It is a form of indirect or derivative liability in that once the agent is found to be primarily liable for a criminal offence, then the corporation can be held liable for that offence, as long as the agent acted within the course and scope of their employment.[38] This method of liability holds that the principal corporation is responsible for the mens rea of the relevant agent who commits the relevant offence.[39] The justification for imposing liability via the vicarious method is that corporations do not have the capacity to possess an intention and therefore the only means by which an intention can be imputed to a corporation is through the intent of the relevant individual/s.[40]

Criticism of vicarious liability pertains to the fact that it fails to reflect the actual culpability on the part of the corporation itself, as the corporation is simply made liable for the fault of another without any proof of the corporation's misfeasance or malfeasance.[41] In such circumstances, the corporation is subject to criminal sanctions where there is actually no evidence of criminal intent on the behalf of the corporation.[42]

Further criticism revolves around the potential scope of the rule being prohibitively broad. A corporation will be held vicariously liable for the acts of its individual agent if the agent commits a crime while

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[30] Walpole, n 4, 238, quoting Eric Colvin, "Corporate Personality and Corporate Crime" (1995) 6(1) *Criminal Law Forum* 1, 1–2.

[31] Acquaah-Gaisie, n 16, 221.

[32] Dixon, n 1, 2.

[33] Dixon, n 1, 2.

[34] ALRC, n 5, 123, 143.

[35] Suzanne Le Mire, "Document Destruction and Corporate Culture: A Victorian Initiative" (2006) 19 *Australian Journal of Corporate Law* 304, 312.

[36] Bant and Paterson, n 24, 64.

[37] ALRC, n 5, 140.

[38] ALRC, n 5, 140–141.

[39] *R v Australasian Films Ltd* (1921) 29 CLR 195, 217.

[40] Dixon, n 1, 4.

[41] ALRC, n 5, 142; Le Mire, n 35, 312.

[42] Le Mire, n 35, 312.

acting within the scope of their employment with the intent to benefit the corporation.[43] This is the case even where the agent has acted contrary to the corporation's policies and procedures.[44] Therefore, the existence of policies and procedures is not a defence to the imposition of criminal liability. At most, it is a mitigating factor for the purposes of sentencing the corporation.[45] In addition, vicarious liability has been said to naturally disincentivise corporations from self-reporting employee misconduct, as doing so increases the chances that the corporation will find itself subject to prosecution and sanctions.[46]

B. Identification Theory

Identification theory also relies upon an individual to attribute liability to the corporation. Under this theory, a high-raking individual agent is assumed to be acting as the corporation and not for the corporation.[47] This is the traditional method by which companies are held liable in most countries under the principles of common law.[48] In Australia, it is the "dominant approach for ascribing corporate criminal liability".[49]

This theory requires that the *directing mind* of the corporation has acted with the necessary requisite fault.[50] A sufficiently senior individual within the corporation is taken to be the metaphorical mind of the corporation itself.[51] This necessitates that there is a person with actual or apparent authority who can be viewed as an organic part of the corporation, that is the *directing mind and will*;[52] the *brain and nerve centre*, or the *embodiment* of the corporation.[53] This theory enables criminal liability to be imposed on a corporation for offences that require mens rea.[54]

Such individuals generally include the "board of directors, the managing director and perhaps other superior officers of a company who carry out the functions of management and speak and act as the company".[55] The identification theory takes the position that the corporation "does not have a mind of its own with real knowledge or intention and can only act through the acts of actual living persons".[56]

In summary, identification theory considers that a corporation has the "requisite [mens rea] for a criminal offence, if:

(1) the board of directors;
(2) the managing director; or
(3) a superior officer or agent with delegated management power from the board of directors or managing director to act on behalf of the company without further instruction.

has the necessary knowledge."[57]

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[43] Dixon, n 1, 4.

[44] Dixon, n 1, 4.

[45] Dixon, n 1, 4.

[46] Mark Lewis, "Corporate and Individual Accountability for Foreign Bribery – An Analysis of Diverging Enforcement Approaches" (2022) 37 *Australian Journal of Corporate Law* 114, 127.

[47] Dixon, n 1, 3.

[48] Dixon, n 1, 3.

[49] Crofts, n 17, 402.

[50] Crofts, n 17, 402.

[51] Dixon, n 1, 3.

[52] Juliette Overland, "Corporate Liability for Insider Trading: How Does a Company Have the Necessary 'Mens Rea'?" (2010) 24 *Australian Journal of Corporate Law* 266, 274.

[53] Karen Wheelwright, "Goodbye Directing Mind and Will, Hello Management Failure: A Brief Critique of Some New Models of Corporate Criminal Liability" (2006) 19 *Australian Journal of Corporate Law* 287, 289.

[54] Crofts, n 17, 402.

[55] Dixon, n 1, 4.

[56] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

[57] Overland, n 52, 275.

Identification theory has been criticised as an "abstract, universal and non-context specific test of general application",[58] and for only being able to function for corporations that have a rigid hierarchical corporate structure, where high-level managers are involved in decision-making.[59] Such a person must be accountable for the corporate policy strategy as well as the administration of corporate activities at the highest level or be delegated such power by those in senior management, such as the CEO or the corporation's board.[60] Identification theory does therefore not extend to "managers exercising substantial managerial functions provided that the board of directors has … retained a formal right of veto or intervention".[61]

Further, less importance is placed on the need for authority to be formally delegated from the CEO or the board.[62] An employee of a corporation who is not of senior management may be identified as the corporation where it can be shown that there is discretion conferred on them which amounts to a delegation of executive authority (whether express or implied) to design and supervise the execution of the corporation's policy instead of merely carrying out such a policy.[63]

This theory has been labelled as "practically impotent",[64] an "obstacle to corporate conviction"[65] and unsatisfactory as it limits a corporation's criminal liability to the conduct or fault of those who are of a sufficiently high level. This acts as a restriction against establishing liability against large corporations.[66] This is especially true as offences committed in such corporations often occur at middle-level management or the lower tier of management.[67] This has been said to shelter the mind or will from liability, due to the separation of high-level managers from mid/lower management,[68] with the effect that mid-level managers become the potential "fall guys when things go wrong".[69] Identification theory proves that one managerial representative of the company is at fault, and not the company itself.[70] As such, it does not cover circumstances where there is no primary individual fault, but there is nevertheless corporate blameworthiness.[71] It fails to bring home the blame for the criminal conduct to the corporation itself.[72]

In the United Kingdom, where the identification theory is preferred by the courts to attribute criminal liability, it has been argued that it fosters a culture of reckless risk-taking in financial markets.[73] It has been described as a "weak tool" for securing a criminal conviction in the context of financial crime, as it is difficult for the prosecution to establish that any one single person carried out all of the necessary elements of actus reus together with the required mens rea.[74]

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[58] Professor Eilis Ferran, "Corporate Attribution and the Directing Mind and Will" (2011) 127 *Law Quarterly Review* 239, 242.

[59] Dixon, n 1, 5.

[60] Wheelwright, n 53, 289.

[61] Wheelwright, n 53, 289.

[62] Wheelwright, n 53, 289.

[63] Wheelwright, n 53, 289.

[64] Jock Gardiner, "Arendt and Corporate Culture: Instilling Thoughtfulness into the Commonwealth Criminal Code" (2018) 33 *Australian Journal of Corporate Law* 25, 40.

[65] Crofts, n 17, 402.

[66] Fisse, n 3, 277.

[67] Fisse, n 3, 277–278.

[68] Dixon, n 1, 5.

[69] Dixon, n 1, 6.

[70] Dixon, n 1, 6.

[71] Crofts, n 17, 403.

[72] Le Mire, n 35, 311.

[73] Jonathan Fisher QC et al, "The Global Financial Crisis: The Case for a Stronger Criminal Response" (2013) 7(3) *Law and Financial Markets Review* 159, 160.

[74] Fisher QC et al, n 73, 161.

Identification theory is too narrow to have a useful application to impose criminal liability on banks and financial institutions and is therefore inadequate to address any corporate fault by them. It fails to "grapple with the reality of contemporary corporations".[75] This is a result of attempting to apply criminal law principles as they pertain to individuals to a corporate entity, leading to a "legal fiction" that is not only inappropriate but one which should also be avoided wherever possible.[76]

C. Aggregation Theory

Aggregation theory holds that when no individual has the sufficient and necessary information to fulfil the required mens rea of an offence, the knowledge, minds and/or culpability of multiple individuals within the corporation can be "aggregated" and attributed to the corporation.[77] The aggregation theory has been described as a "re-interpretation" of the identification theory,[78] which re-affirms the application of the identification theory itself.[79]

The leading case in this regard is the Privy Council case of *Meridian Global Funds Management Asia Ltd v Securities Commission* (*Meridian*).[80] The case considered whether the mental state of junior employees could be attributed to the management of the corporation by aggregating their collective mental state.[81] The Privy Council held that the conduct of the low-level employees was capable of being attributed to the corporation as a whole by aggregating their mental state and actions of all those involved in the making of the relevant decision.[82]

Edelman J in *Commonwealth Bank of Australia v Kojic* (*Kojic*)[83] essentially put to bed the notion that aggregation theory is to be accepted in Australia. That case concerned alleged unconscionable dealing in which the plaintiff alleged that the knowledge of two office holders in the corporate defendant, who occupied different roles in the corporation and who had different relations to the parties involved in the security and loan transactions, should be aggregated.[84] Edelman J relevantly held that:

> [A]n aggregation principle could undermine the fundamental question to be asked …: "is the conduct unconscionable"? It is not easy to see how a corporation, which can only act through natural persons, can engage in unconscionable conduct when none of those natural persons acts unconscionably. Similar reasoning has led courts to reject submissions that a corporation has acted fraudulently where no individual has done so (in instances of deceit) and that a corporation has acted contumeliously where no individual has done so (in cases of exemplary damages).[85]

Criticism of aggregation theory, especially in the *Meridian* vein, have been that aggregation theory is too ill-defined and that it also extends criminal corporate liability too far.[86] However, Edelman J in *Kojic* in obiter stated that there may be scope for finding a corporation liable for unconscionable conduct even if no one person possesses the requisite intention by looking at whether a corporation structures itself to silo its information and knowledge, and to compartmentalise its responsibility.[87] Edelman J relevantly stated:

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[75] Wheelwright, n 53, 290; Crofts, n 17, 402.

[76] Wheelwright, n 53, 290.

[77] Dixon, n 1, 5–6.

[78] Gardiner, n 64, 32.

[79] Ferran, n 58, 245.

[80] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

[81] Gardiner, n 64, 32.

[82] Gardiner, n 64, 32.

[83] *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, [99] (Edelman J); [2016] FCAFC 186.

[84] *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, [99] (Edelman J); [2016] FCAFC 186.

[85] *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, [112]; [2016] FCAFC 186 (Allsop CJ generally agreeing at [31], but see [64]).

[86] Gardiner, n 64, 32.

[87] Justice James Edelman, "Corporate Attribution and Responsibility" (BFSLA 2021 National Conference, BFSLA, 17 September 2021); Gardiner, n 64, 33.

> Although this is not such a case, it is possible that there could be examples where a corporation acts unconscionably even though no individual has acted unconscionably. For instance, in a case where no individual has the knowledge required to establish wrongdoing, it might be difficult for a corporation to avoid a finding that it has acted unconscionably if it puts into place procedures intended to ensure that no particular individual could have the requisite knowledge. The same might be true if a corporation's procedures were such that those formulating them were reckless about serious consequences.[88]

These observations by Edelman J are particularly poignant when one considers the failings of the current attributive models of corporate criminal liability and the development of the more modern and appropriate theories of corporate criminal liability, known as "organisational liability".

III. Theories of Organisational Liability

Corporations are now becoming recognised as "more than aggregates of their numbers; they are discrete moral entities which can be criminally culpable in their own right".[89] The theory of organisational liability is relatively recent and is not constrained by the view that corporations cannot be held directly criminally responsible for their actions.[90] It is therefore a more conceptually sophisticated approach than that of the (traditional) attributive models, as it appreciates the entirety of corporate action and its existence.[91] By focusing on the corporation, the law recognises that the corporation's culture or personality affects the decision-making of the individual employees and agents within it.[92] Such a theory seeks to construct a unique model of corporate fault to that of the corporation itself.[93]

The organisational theory of liability "aim[s] to locate corporate responsibility in what corporations as organisations … contribute to misconduct".[94] Various models of organisational liability have been proposed, those models include holding a corporation organisationally liable where the corporation:[95]

- "failed to put in place practices and procedures capable of preventing the commission of a crime' or failed 'to respond reasonably to the discovery of wrongdoing" or "undertake reasonable corrective or remedial measures in reaction to an offence" (*reactive and preventative fault models*);
- has an "ethos or personality" that "encourages agents to commit criminal acts" (*corporate ethos model*);
- makes "decisions and choices that are communicated through corporate policy" and through which "corporate actions and intentions may be constructed"; or
- can have a mental statement attributed to it based on its "behaviour … and apparent intentions".

The primary models of organisational liability which appear to have the greatest application are the reactive fault model, the preventative fault model, and the corporate ethos (culture) model.[96] However, debate surrounds the conceptual difficulty of making organisational liability theoretically coherent as well as ensuring that it can be applied practically and effectively.[97]

A. Reactive and Preventative Fault Models

The reactive fault model is an implied fault-based form of liability,[98] which proposes that a Court should be empowered to order a corporation to undertake an internal investigation, following an act of corporate

[88] *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, [153]; [2016] FCAFC 186.

[89] Acquaah-Gaisie, n 16, 221.

[90] ALRC, n 5, 147.

[91] Walpole, n 4, 253.

[92] Le Mire, n 35, 311.

[93] Walpole and Corrigan, n 6, 498.

[94] Walpole, n 4, 253.

[95] Walpole, n 4, 253.

[96] Dixon, n 1, 6–7.

[97] ALRC, n 5, 148.

[98] Gardiner, n 64, 37.

misconduct.[99] It has been broadly defined as an "unreasonable corporate failure to devise and undertake satisfactory preventive or corrective measures in response to the commission of the *actus reus* of an offence by personnel acting on behalf of the organisation".[100] This infers fault when the corporation has become aware of risk or harm being caused by an employee or an agent but fails to put in place appropriate measures to deter, or respond to, such conduct.[101]

Under this model, the culpability of a corporation is not assessed at the time of the criminal act, but rather criminal liability is attributed when the corporation fails to react appropriately to the misconduct or when it unsatisfactorily responds to the commission of the actus reus of the offence, such as failing to take action to rectify the misconduct.[102] The mens rea of the offence is evidenced through a culture of non-compliance or a failure to exercise due diligence or a failure to take reasonable precautions.[103] For example, where there is an "express or implied corporate policy to fail to take preventive or corrective reactive measures, this may reflect deliberate or reckless organisational intentionality".[104]

This model of organisational liability circumvents evidentiary challenges and requires the defendant corporation to prove that it had developed adequate, reasonable or proportionate measures to prevent the occurrence of the crime.[105] This reverses the onus of proof back onto the defendant corporation, undermining the presumption of innocence and thereby assisting the likelihood of a successful prosecution occurring.[106] However, the corporation in its defence only needs to prove that it had in place the presence, and use of, adequate and reasonable policies and procedures and not that the corporation had a lack of guilt.[107] Therefore, corporations under this model are incentivised to have proper and substantive policies and procedures in place to fulfil their compliance obligations.[108]

Under the preventative fault model, a corporation that fails to insert and implement adequate systems and policies to prevent the commission of an offence can have criminal liability attached to it.[109] Under this model, corporate culture can act as both an aggravating and mitigating factor.[110] If a contravention of the law is committed, the corporation can provide evidence that it occurred notwithstanding the corporation having an effective ethics and compliance program in place. Consequently, any penalty which is imposed could be reduced on that basis.[111]

The basis of attributing fault under the reactive or preventative fault models is the same, with the difference being that preventative fault is assessed before the commission of the offence, while reactive fault is assessed subsequently to the commission of the offence.[112] Therefore, the two models are somewhat intermingled to a degree and the terminology of reactive and preventative fault is occasionally used interchangeably.

The liability of a corporation under the reactive fault model is determined not on the basis of the act of misconduct, but instead on the basis of a failure of the corporation to react – that is if the corporation

[99] Dixon, n 1, 6–7.

[100] Dixon, n 1, 6–7.

[101] Le Mire, n 35, 315.

[102] Dixon, n 1, 6.

[103] Dixon, n 1, 6.

[104] Bant, n 26, 371.

[105] Crofts, n 17, 417.

[106] Crofts, n 17, 417.

[107] Crofts, n 17, 418.

[108] Crofts, n 17, 418.

[109] Dixon, n 1, 6.

[110] Dixon, n 1, 7.

[111] Dixon, n 1, 7.

[112] Dixon, n 1, 8.

fails to accept and implement corrective measures after the commission of the crime.[113] Such a failure to react does not form the mens rea concerning the act of misconduct, it only serves as evidence of the corporation's intention, recklessness, or negligence in relation to any subsequent act of misconduct.[114] Critics argue that positive acts by a corporation should be able to find criminal culpability due to the criminal legal doctrine that omissions are generally not criminalised.[115] By approaching the imposition of criminal liability in this way, the original criminal act of misconduct goes unpunished, thereby undermining one of the key principles of criminal law.[116] Critics further argue that the preventative and reactive fault models all but abandon "the requirement for finding a *mens rea*, or a mental state associated with corporate acts".[117]

B. Corporate Ethos/Corporate Culture Model

Under this model corporate criminal liability is not located within one individual, be that a senior employee or officer, but is instead located more widely in the "culture" of the corporation itself.[118] Organisational liability under the "corporate ethos model" is based on the premise that the corporate state of mind manifests itself in the corporation's "systems, policies and patterns of behaviours",[119] or that of the corporation's culture, being the "attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place".[120] It is this *corporate ethos* to which criminal liability can be attached.[121]

Under this model, organisational liability is justified by reference to the presumption that in many situations, the harm occasioned may have less to do with the misconduct or incompetence of individual actors but instead have more to do with the systems which fail to address the problems of risk within the corporation.[122] It has been described as a "radical conception" of corporate liability,[123] but also perhaps the most practical of the organisational liability models.[124]

Here, the corporation is taken to have authorised or permitted a contravention of the law if it can be proved that a "corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance" or the "body corporate failed to create and maintain a corporate culture that required compliance".[125] Therefore, the manifestation of the corporation's state of mind occurs when the corporation contravenes the law as a result of adopting a system of conduct or a pattern of behaviour, or such a system, conduct, or behaviour is designed/calculated to contravene a law.[126] Therefore, the distinct "ethos" of the corporation once identified can be translated into a mens rea.

While the corporate ethos/culture concept in theory addresses the multi-facets of corporate decision-making, it is unclear how such a model fits within the individual nature of criminal law.[127] It has been argued that by abandoning the individual-based fault method in favour of the ethos/culture model, the

[113] Dixon, n 1, 8.

[114] Dixon, n 1, 8.

[115] Crofts, n17, 420.

[116] Crofts, n17, 420.

[117] Dixon, n 1, 8.

[118] Comino, n 7, 300.

[119] Bant and Paterson, n 24, 76.

[120] Dixon, n 1, 9.

[121] Gardiner, n 64, 40.

[122] Dixon, n 1, 3.

[123] ALRC, n 5, 148.

[124] Dixon, n 1, 7.

[125] Dixon, n 1, 9.

[126] Bant and Paterson, n 24, 77.

[127] Gardiner, n 64, 42.

fault elements of an offence are unable to be applied as they would be to an individual person.[128] This has been said to be its primary failing, in that it lacks specificity to differentiate between "varying degrees of culpability such as knowledge, recklessness, and negligence and does not offer suggestions as to the process one would undertake to determine the ethos that is relevant to the criminal act in question".[129]

Further, the concept of a *corporate culture* has been described as "inherently slippery".[130] This is due to corporate culture being an "imprecise, nebulous concept" and there being somewhat little commonality between its alternative definitions.[131] Without case law, it is challenging to predict how a court will define "corporate culture".[132] These criticisms are just as relevant in the context of the current statutory model in Australia for imposing corporate criminal liability, which is explored further below.

IV. Statutory Corporate Criminal Responsibility

In addition to the methods of imposing criminal liability at general law, criminal liability may also be determined according to statute. Australia has in place two mechanisms by which offences that require human acts and states of mind can be attributed to corporations to impose criminal liability on the corporation.[133] They are:

(1) the "TPA Model" – a collection of features common among statutory methods of attribution that originated in s 84 of the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)); and
(2) Part 2.5 of the *Criminal Code*.

The TPA model is based on a modified form of vicarious liability, which deems the relevant conduct of a "director, employee or agent" to be the conduct of the corporation.[134] This approach attributes to the corporation any "state of mind" of employees, agents, or officers.[135] This has also been said to be a form of direct, not vicarious liability.[136] Regardless, this model intended to capture a "coherent and workable concept of corporate fault".[137]

It was this approach that subsequently informed the development of Pt 2.5 of the *Criminal Code*.[138] Given the unsatisfactory state of corporate criminal liability in both the sense of the attributive models at common law and the TPA Model, Pt 2.5 of the *Criminal Code* takes a different approach. The approach it takes somewhat recognises the strengths of arguments concerning why organisational liability should be the predominant method through which corporate criminal liability should be imposed. Part 2.5 aligns with the concept of imposing organisational liability on a corporation, primarily through the Corporate Ethos/Corporate Culture Model.[139]

The Model Criminal Code Officers Committee (MCCOC), which was responsible for drafting the code attempted to "develop a scheme of corporate criminal responsibility which as nearly as possible, adapted

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[128] Gardiner, n 64, 42.

[129] Dixon, n 1, 8.

[130] Jennifer Hill, "Legal Personhood and Liability for Flawed Corporate Cultures" (Working Paper No 431/2018, University of Sydney and ECGI, 2018) 1, 3.

[131] ALRC, n 5, 148.

[132] Kristen Wong, "Breaking the Cycle: The Development of Corporate Criminal Liability" (Bachelor of Laws (Honours), The University of Otago, 2012) 39.

[133] ALRC, n 5, 219.

[134] ALRC, n 5, 246, fn 67.

[135] ALRC, n 5, 230.

[136] ALRC, n 5, 225.

[137] ALRC, n 5, 246.

[138] *Criminal Code Act 1995* (Cth) Sch 1.

[139] Bant, n 26, 369.

personal criminal responsibility to fit the modern corporation".[140] This led to MCCOC seeking to retain fundamental criminal law concepts such as the presumption of innocence, primary liability, the criminal standard of proof, the partition of offences into physical and fault elements and a demarcation between advertent and inadvertent fault.[141] The MCCOC was of the view that the best method by which to impose such liability was through the corporate culture provisions as it would capture "the more elusive situation of implicit authorisation where the corporate culture encourages non-compliance or fails to encourage compliance".[142]

Part 2.5 attributes fault in Commonwealth criminal law in two ways: one, by attributing intention, knowledge, and recklessness, and two, by attributing negligence. Therefore, Pt 2.5 incorporates key elements of organisational liability such as intention, knowledge, and recklessness as being able to be proved in reference to the corporate culture of a corporation.[143] As discussed above, this model considers that a corporation is capable of being criminally responsible in its own right and that it has a "distinct and identifiable personality independent of specific individuals".[144] This enables criminal liability to be attributed to a corporation without the need to find individual fault, allowing the potential difficulties of the identification theory to be overcome.[145]

This is significant, as such an approach differs from that of other common law jurisdictions such as the United States and the United Kingdom, leading it to be described as the "most progressive model for fixing criminal liability to corporations" in comparison to other jurisdictions.[146]

Division 12 of the *Criminal Code* provides the relevant key provisions:

12.1 General principles

(1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

(2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

Note: Section 4B of the Crimes Act 1914 enables a fine to be imposed for offences that only specify imprisonment as a penalty.

12.2 Physical elements

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

12.3 Fault elements other than negligence

(1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

(2) The means by which such an authorisation or permission may be established include:

(a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

[140] Tahnee Woolf, "The Criminal Code Act 1995 (Cth) – Towards a Realist Vision of Corporate Criminal Liability" 21(5) Crim LJ 259, quoting Criminal Law Officers Committee of the Standing Committee of Attorneys-General, Australian Government, *Model Criminal Code* (Final Report, 1992) 107.

[141] Criminal Law Officers Committee of the Standing Committee of Attorneys-General, n 140, 107.

[142] Criminal Law Officers Committee of the Standing Committee of Attorneys-General, n 140, 113.

[143] ALRC, n 5, 147, fn 112.

[144] ALRC, n 5, 147.

[145] Comino, n 7, 300.

[146] Comino, n 7, 301 quoting Simon Bronitt, "Rethinking Corporate Prosecution: Reviving the Soul of the Modern Corporation" (2018) 42(4) Crim LJ 205, 206.

(b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

(3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

(4) Factors relevant to the application of paragraph (2)(c) or (d) include:

(a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
(b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

(5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

(6) In this section:

"***board of directors***" means the body (by whatever name called) exercising the executive authority of the body corporate.

"***corporate culture***" means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.

"***high managerial agent***" means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

Part 2.5 is a "conceptually sophisticated model of corporate attribution" which "uses traditional agency principles to establish the liability of a corporation for the physical elements of an offence".[147] The concept of organisational liability under the *Criminal Code* has become to be commonly known as the corporate culture provisions.[148] Section 12.3(1), (2)(c)(d), 4(a)(d) (as set out above) are the crucial provisions in this regard.[149]

Part 2.5 reflects the "reactive corporate fault" model of imposing organisational liability on a corporation.[150] It allows the Court to examine the *mindset* of the corporation to determine the degree to which its practices and procedures contributed to the alleged offence and to also examine the corporation's "unwritten rules". The Court may then determine from that examination whether or not those unwritten rules are a legitimate attempt to ensure that a corporation is compliant with the law.[151]

However, despite its pioneering approach to imposing criminal liability on a corporation, it has rarely been used in practice (for reasons outlined below) and the TPA model remains the more prominent statutory model for attributing corporate criminal liability under Commonwealth Law.[152]

[147] Walpole, n 4, 247.

[148] Bant, n 26, 369.

[149] Bant, n 26, 369.

[150] As discussed earlier in this article: also see Bant, n 26, 370.

[151] Hill, n 130, 17.

[152] Walpole, n 4, 247.

A. Criticisms of the Statutory Models

The ALRC has stated that the existing statutory methods for attributing corporate criminal liability are deficient in that they "do not reflect notions of organisational blameworthiness or culpability in a consistent manner" and that they do not "necessarily reflect the ways in which corporations are structured in practice".[153] This has been said to result in there being an appreciable risk that a different level of responsibility may be imposed on the same conduct of a corporation depending on which statutory scheme is applied, as well as a particular statutory scheme being applied inconsistently and unevenly between corporations, depending on the size and complexity of the corporation.[154]

Particular criticisms of Pt 2.5 of the *Criminal Code* (in addition to the general criticisms of Organisational Liability) have also been made by many commentators and academics. Such criticisms include arguments that it has failed to "realise its potential for a range of practical, doctrinal and legislative reasons", as well as not yet being the subject of any authoritative deliberation by the Courts.[155] Therefore, there is said to be great uncertainty as to how the provisions will be practically applied.[156] There are numerous reasons for this, including prosecutorial reluctance, as proving the culture of a corporation is said to be an onerous task,[157] the fact that Pt 2.5 has largely been excluded from operation in relation to key legislative schemes undermining the relevance of the corporate culture provisions,[158] that Pt 2.5 only applies to Commonwealth offences,[159] while most offences are contained within state-based law,[160] and that the physical elements of the offence still need to be proven and be attributed to the poor culture of a corporation.[161]

Concerning the exclusion of Pt 2.5 from some legislative schemes, such as the regulation of financial services (under Ch 7 of the *Corporations Act 2001* (Cth)),[162] pursuing criminal prosecutions against officers and directors who have supervisory roles in corporations with defective cultures,[163] and consumer protection and taxation offences,[164] results in a discrepancy between the principles of criminal responsibility applying in respect to offences under those schemes and those which are "founded on the basis of corporate culture failures" under Pt 2.5.[165] Such an approach reduces the likelihood of prosecution and, consequently, judicial consideration of the legislation.[166]

Having a multiplicity of different rules of attribution leads to inequality in their application, which runs counter to the foundation of criminal law being that the imposition of criminal responsibility should be consistent and coherent.[167] Having no one uniform regime leads to confusion as to the applicability of Pt 2.5 and consequently confusion as to when a corporation may be taken to be criminally liable.[168] This

[153] ALRC, n 5, 219.

[154] ALRC, n 5, 219.

[155] Bant and Paterson, n 24, 78.

[156] Bant, n 26, 371.

[157] Comino, n 7, 302.

[158] Hill, n 151, 18.

[159] Bant, n 26, 371.

[160] Dixon, n 1, 12.

[161] Radha Ivory and Anna John, "Holding Companies Responsible: The Criminal Liability of Australian Corporations for Extraterritorial Human Rights Violations" (2017) 40(3) *University of New South Wales Law Journal* 1175, 1194.

[162] See s 769A of the *Corporations Act 2001* (Cth), which provides that Pt 2.5 of the *Criminal Code Act 1995* (Cth) does not apply to Ch 7 of the *Corporations Act*.

[163] Comino, n 7, 303.

[164] Dixon, n 1, 12.

[165] ALRC, n 5, 221.

[166] Crofts, n 17, 407.

[167] ALRC, n 5, 222.

[168] ALRC, n 5, 221.

line of criticism espouses the view that decisions as to whether to charge a corporation with an offence are hindered by having competing and different methods in place by which such an action could be brought. Instead, such a decision should come down solely to the extent to which the evidence proves the offence, not under which system the action is brought.[169]

In that regard, there are difficulties with bringing a corporate prosecution based on what is seen as a nebulous concept of corporate culture.[170] The evidence to prove a culpable corporate culture remains uncertain and potentially subjective.[171] It is unlikely that a corporation would have evidence of its poor culture in writing and therefore the ability to obtain written evidence going towards a corporation's culture is limited.[172] The prosecution will often depend upon subjective evidence from people who are inside the corporation and who are familiar with the corporation's operations and culture.[173] Further, the evidence which is necessary for prosecution is controlled, and in the possession of, the accused corporation itself. This burdens the prosecution with a somewhat impossible task as the prosecution has to delve into the files of the company in question to obtain evidence.[174] Further, regulators have also failed to escalate criminal prosecutions in appropriate circumstances.[175]

In addition, the concept of corporate culture cannot be translated into specific mental elements of intention, knowledge, and recklessness.[176] How the corporate culture provisions are interpreted leads to the conclusion that culpability of the individual is a condition precedent to organisational culpability– there must be some fault on the part of a human agent for fault to be attributed to the corporation.[177] This is an example of how such a "fundamental criminal law requirement of subject *mens rea* is inappropriate in the context of corporations. Given … the difficulty of locating corporate intent,[178] and given the larger the corporation the greater difficulty there will be in ascertaining what its corporate culture is".[179]

These difficulties in practically applying the corporate culture provisions have led to them being described as "displaying more academic purity than practical utility".[180] These criticisms suggest that without a reform of the way in which Pt 2.5 imposes criminal liability on a corporation, Pt 2.5 may continue to have limited application in practice.[181]

B. Regulatory Attempts at Accountability

As a result of the Hayne Royal Commission, there has been a push to restore trust and accountability in the financial sector. To that end, recent legislative reforms have been introduced by the Australian Government in an attempt to address systematic misconduct in the financial services sector in Australia. The primary scheme that the Australian Government has introduced in this regard is the BEAR (which is anticipated to soon become the Financial Accountability Regime (FAR)).[182]

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[169] ALRC, n 5, 222.

[170] Dixon, n 1, 15.

[171] Bant, n 26, 376.

[172] Comino, n 7, 302.

[173] Dixon, n 1, 5.

[174] Jerome Entwisle, "Corporate Liability for the Bribery of Foreign Public Officials: Reassessing Australia's Legislative Regime in Light of the 'Banknote Scandal' and UK Bribery Act 2010" (2012) 27(2) *Australian Journal of Corporate Law* 220.

[175] Walpole, n 4, 256.

[176] George R Skupski, "The Senior Management Mens Rea: Another Stab at a Workable Integration of Organizational Culpability into Corporate Criminal Liability" (2011) 62 *Case Western Reserve Law Review* 263, 304–306.

[177] Dixon, n 1, 14.

[178] Woolf, n 140, 266.

[179] Dixon, n 1, 14.

[180] Dixon, n 1, 12, quoting J Clough and C Mulhern, *The Prosecution of Corporations* (OUP, 2002) 148.

[181] Dixon, n 1, 12.

[182] *Financial Accountability Regime (FAR) Bill 2022* (Cth). The FAR will replace the BEAR and extend a similar accountability regime for all APRA regulated entities and their senior executives and provide joint administration to ASIC as the conduct regulator.

The *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Act 2018* (Cth) came into effect on 1 July 2018. The background to the passing of this legislation was best summarised in the *Australian House of Representatives Standing Committee on Economics, Review of the Four Major Banks (the Coleman Report)* where it was stated that:[183]

> The major banks have a "poor compliance culture" and have repeatedly failed to protect the interests of consumers. This is a culture that senior executives have created. It is a culture that they need to be accountable for.

A key objective of the BEAR is to improve the operating culture of authorised deposit-taking institutions (ADIs) and to improve transparency and accountability across the banking sector.[184] This heightened level of accountability on senior management is an attempt to address the alleged *poor compliance culture* in banks.[185] The BEAR seeks to address this issue by imposing accountability obligations on the board and senior executives (accountable persons) of ADIs. Examples of such obligations are that accountable persons need to be diligent in performing their duties and for them to adopt a risk-averse stance in their decisions.[186]

The BEAR further seeks to moderate how monetary incentives and disincentives are paid in order to influence how the senior management and board of a bank behave. For example, the BEAR aims to do this by reducing the amount of variable remuneration of an accountable person, when that person has failed to comply with his or her accountability obligations.[187]

Another aspect of the BEAR relates to enforcement and penalties. Critically, the Australian Prudential Regulation Authority is authorised to disqualify an accountable person if it considers it is satisfied that the person has not complied with his or her accountability obligations.[188] With regards to an ADI, it is liable to a pecuniary penalty if it contravenes its obligations under the BEAR.[189]

While the BEAR appears to increase the accountability of the boards and senior management of banks, critics have stated that the BEAR is ad hoc legislation,[190] which creates more complexity and uncertainty.[191] Critics point out that the BEAR has various occurrences where terms are ill-defined, or undefined, which may lead to confusion and a misunderstanding of what compliance with the BEAR looks like.[192] An example of this is that the terms honesty, integrity, due skill, diligence and open, constructive and cooperative are undefined in the *Banking Act 1959* (Cth) and as a consequence, they are to have their ordinary meaning applied.[193] Therefore, there are questions about how such terms are to be interpreted and how far one has to go to act with integrity.[194]

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[183] Australian Federal Treasury, *Restoring Trust in Australia's Financial System: Government Response to the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (4 February 2019) 3 <https://static.treasury.gov.au/uploads/sites/1/2019/02/FSRC- Government-Response-1.pdf>.

[184] Parliament of the Commonwealth of Australia, *Revised Explanatory Memorandum to the Bill* (2016–2018) 9.

[185] Angus Young, "Restoring Trust in Australia's Financial Services Sector: From the Banking Executive Accountability Regime to the Strengthening Corporate and Financial Sector Penalties" (2019) 34(6) *Journal of International Banking Law & Regulation* 185, 186.

[186] Young, n 185, 189.

[187] *Banking Act 1959* (Cth) s 37E.

[188] As well as the Australian Securities and Investments Commission (ASIC) under the FAR, for entities licensed under financial services law or credit legislation; *Banking Act 1959* (Cth) s 37J.

[189] *Banking Act 1959* (Cth) s 37G.

[190] John HC Colvin and Brendan Hord, "Criminal Director Liability: A Bridge Now too Far?" (2020) 35 *Australian Journal of Corporate Law* 187, 192.

[191] Andrew Godwin, "Corporate Counsel – Moral Guardians or Just Legal Advisers?" (2020) 35 *Australian Journal of Corporate Law* 56, 71.

[192] Mylecharane, n 8, 30; such criticisms are equally applicable to the FAR.

[193] Mylecharane, n 8, 30; Note that the situation remains the same under the FAR.

[194] The same questions can be asked of the FAR Regime.

Given the complexity and lack of defined terms, the BEAR will need to be applied on a case-by-case basis, which leads to uncertainty and unnecessary litigation as well as the possibility of inconsistent outcomes between cases. Such issues inhibit the ability of the BEAR to truly have an impact on the culture of banks and influence the behaviour of individuals within them.

Importantly, both the BEAR and the FAR (in its current form) do not provide for any civil or criminal penalties to be imposed on non-complying entities for the actual conduct they engage in.[195] Consequently, neither of these regimes addresses the core argument of this article that to deter banks and financial institutions from engaging in corporate malfeasance, criminal liability should be capable of being imposed on the corporation itself, not just on individuals who form part of the board and/or senior management.

V. The Case for the Adoption of Organisational Liability to Banks and Financial Institutions

There has been an increasing awareness of the prevalence of damage caused by large corporations and the seeming lack of criminal liability attributed to those organisations.[196] *Culture* was identified by Commissioner Hayne as a key component of enabling the misconduct which had occurred within banks and financial institutions subject to the Hayne Royal Commission.[197] Commissioner Hayne found that "remuneration policies and practices" were the main drivers of a bank or a financial institution's culture.[198] All around the world the bad culture which appears to be prevalent within banks and financial institutions has permitted or even encouraged bad behaviour or has otherwise been the reason why the bad behaviour has been allowed.[199]

It has become clear that there is a need to address the sub-standard corporate processes and systems in banks and financial institutions which result in corporate misconduct.[200] The current attributive models of corporate criminal liability are insufficient in ensuring that criminal liability is equitably and appropriately imposed on them. The ability to identify true corporate fault through the bank's or financial institution's actions and processes more appropriately reflects the reality of this type of corporate entity, being greater than the sum of its parts.[201] This is especially important when considering that the behaviour of individuals is greatly altered due to the corporate environment that surrounds them, with the impact being that it becomes unlikely that an individual will act ethically in such an environment.[202] Consequently, it is entirely reasonable that the law should recognise this and act to address this issue.[203]

Further, as a creation of law, corporations have all the rights, capacities, and liabilities of an individual as conferred by law.[204] A bank or financial institution having the capacity to be criminally responsible is entirely consistent with its conceptualisation as a juristic entity.[205] The capacity for a bank or financial institution to be criminally responsible is not dissimilar from all the other rights, privileges, and capacities

[195] Criminal penalties are able to be imposed under the FAR for non-compliance of directions given by the regulators.

[196] Crofts, n 17, 395.

[197] Comino, n 7, 305.

[198] Comino, n 7, 310.

[199] Ann Wadrop and David Wishart, "What Can the Banking Royal Commission Achieve: Regulating for Good Corporate Culture" (2018) 43(2) *Alternative Law Journal* 81, 82.

[200] Walpole and Corrigan, n 6, 503.

[201] ALRC, n 5, 137–138.

[202] Le Mire, n 35, 312.

[203] Comino, n 7, 310.

[204] ALRC, n 5, 138.

[205] ALRC, n 5, 138.

that are conferred upon them by law.[206] A bank or financial institution through its decision-making process can make decisions independently of any of its individual members, officers, or agents.[207]

The corporate ethos/culture model of organisational liability has been said to deepen the understanding of corporate culture and one which presents "one of the strongest cases for holding companies liable as accessories to the crimes of their workforce".[208] Basing organisational liability on the corporate ethos/culture model has the potential to encourage banks and financial institutions to improve their processes and systems to try to avoid corporate criminal liability.[209] It could lead to the likelihood that the employees, agents, and officers of a bank or financial institution will improve their compliance with the law and that they will act more ethically in their activities.[210] A corporate culture approach would mean that the requisite intention would not need to be found in the minds of senior-level employees but instead through either the express or implied policies of the bank or financial institution.[211] It allows criminal liability to overcome the difficulties associated with the identification theory as it does not require a "controlling mind".[212] For example, criminal conduct by a low-level employee or an agent would actually be that of the bank or financial institution itself where the conduct is consistent with its corporate culture.[213]

Such an approach makes logical sense, attributing egregious misconduct to an employee overlooks the point that in any sizeable modern-day bank or financial institution, staff constantly leave, transfer between departments and roles, get fired, get promoted, or resign, however, what remains constant is the bank's or financial institution's structures, policies, and procedures.[214] It reflects the reality of what actually occurs, in that it is not what any one person "did, knew or intended" but that the bank's, or financial institution's systems, policies, practices, and procedures are defective and give rise to, or conceivably even encourage, or result in, the misconduct occurring.[215] This recognises the problem identified earlier in this article, that is, that banks and financial institutions are "of complex, dispersed and decentralised corporate structures".[216]

In addition, there is a need to address the communal nature of a bank or financial institution that intermixes human exertion with technology when conceptualising corporate criminal behaviour in this context.[217] Actions and errors caused or facilitated by technology may have no one individual to which liability could be attributed.[218] This is where the theory of organisational liability is better suited to impose criminal blameworthiness on a bank or financial institution in comparison to the attributive models of corporate criminal liability.

This is especially important as technology is progressing at a rapid pace, soon fully automated AI may be able to make decisions and be capable of committing corporate crime on its own.[219] Adopting the theory of organisational liability to impose criminal responsibility on a bank or financial institution is important

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[206] ALRC, n 5, 139.

[207] Walpole, n 4, 254.

[208] Dixon, n 1, 8, quoting J Gobert and M Punch, *Rethinking Corporate Crime* (CUP, 2003) 55, 74.

[209] Le Mire, n 35, 315.

[210] Le Mire, n 35, 315.

[211] Le Mire, n 35, 313.

[212] Comino, n 7, 300.

[213] Le Mire, n 35, 312.

[214] Bant, n 26, 371.

[215] Bant and Paterson, n 24, 78.

[216] Bant, n 26, 371.

[217] Walpole and Corrigan, n 6, 503.

[218] Walpole and Corrigan, n 6, 503.

[219] Nora Osmani, "The Complexity of Criminal Liability of AI Systems" (2020) 14(1) *Masaryk University Journal of Law and Technology* 53.

in this context. AI is likely to play an increasingly important role in the commissioning of criminal acts in the future and organisational liability will be more likely to capture the criminal actions of AI.[220] This is because there is a potential absence of the mens rea element altogether, as an AI could perform the actus reus autonomously and the creator or the deployer of AI may neither know nor predict the AI's criminal conduct or omission.[221] If methods of attribution were how criminal liability was to be imposed, then there would be a great incentive for the employees and agents of a bank or financial institution to avoid finding out what the AI is actually doing, since it would then be more difficult to argue that there is any individual blameworthiness which could be attributed to the bank or financial institution.[222]

One example of how organisational liability could find operation in relation to AI is the preventative model of organisational liability. Under that model, a bank or financial institution could be held liable for the conduct of its AI by failing to adopt measures to prevent criminal conduct by its AI in circumstances where the bank or financial institution should have known or at a bare minimum, assumed that the conduct of the AI could be criminal in nature.[223]

VI. Proposed Models of Corporate Criminal Liability for Banks and Financial Institutions in Australia

There is a concern both in Australia and abroad, that major banks and financial institutions are simply "too big to fail" and that the criminal prosecution of a major bank or financial institution could cause collateral damage and precipitate "corporate failure with devastating consequences for innocent parties and market confidence".[224] Such a view is fed by the mantra of banks and financial instructions themselves, which promote the policy that their "internal organisation should be free from outside interference–that they should be autonomous".[225]

Due to the above rationale, the prevailing approach by United Kingdom and United States regulators in dealing with criminality within, and by, large banks and financial institutions has been to enter into Deferred Prosecutions Arrangements with the subject corporation or to impose lower fines upon them.[226] In Australia, enforceable undertakings are the preferred regulatory tool of choice.[227] This reluctance to bring serious prosecutorial heat to large banks and financial institutions is unsatisfactory and is, in itself, a form of complicity. Such an attitude puts too much discretion in the hands of prosecutors and creates a dual system of justice, which results in only some bad actors being held to account for their actions.[228]

Therefore, both the common law and statutory models through which corporate liability can be determined are outdated. The current systems are uncertain and unsatisfactory and the need for reform is necessary.[229] A failure by corporate regulators to prosecute senior executives from large banks and financial institutions is contributing to a public perception that senior management in large banks and financial institutions are immune from accountability for misconduct that they oversee.[230]

[220] Thomas King et al, "Artificial Intelligence Crime: An Interdisciplinary Analysis of Foreseeable Threats and Solutions" (2020) 26(1) *Science & Engineering Ethics* 90; Osmani, n 219, 72.

[221] King et al, n 220, 95.

[222] King et al, n 220, 95.

[223] Osmani, n 219, 73.

[224] Comino, n 12, 20.

[225] Comino, n 7, 298, citing David Wishart, Ann Wardrop and Marilyn McMahon, "The Internal Autonomy of the Firm" (2018) 27(1) *Griffith Law Review* 131, 131.

[226] Comino, n 12, 20.

[227] Comino, n 12, 15.

[228] Lewis, n 46, 118.

[229] Bant, n 26, 377.

[230] Lewis, n 46, 116–117.

Such reforms should go towards creating a uniform, coherent and consistent body of law that applies equally to all banks and financial institutions, regardless of their size or corporate structure. In this regard, a couple of different proposals for imposing corporate criminal liability are outlined below.

A. The ALRC Proposals

In its final report, the ALRC made numerous recommendations, which, if accepted, would strengthen the application of the corporate culture provisions.[231] For example, one recommendation was to change the terminology of offence contained throughout s 12.3 to "the physical element" which would include "conduct (including an omission or a state of affairs), a result of conduct, or a circumstance in which conduct, or a result of conduct, occurs".[232] The intended effect of this reform would be that it would become unnecessary to find a single person whose malfeasance could be contributed to the bank or financial institution.[233]

The following further proposals by the ALRC are designed to capture a corporation's moral blameworthiness, to ensure that the criminal law is non-discriminate in its application regardless of the size of a corporation, its corporate structure, or its management structure.[234] The model of attribution should reflect the reality of modern corporate decision-making and should create simplicity and certainty for corporations, regulators and prosecutors.[235]

However, the main proposal relevant to this article was the ALRC's eighth recommendation that "the Australian Government should introduce offences that criminalise contraventions of prescribed civil penalty provisions that constitute a system of conduct or pattern of behaviour by a corporation".[236] This would constitute a new type of offence known as a "system of conduct offence".[237] The recommended offence would provide a method by which "systematic misconduct" would be captured instead of it having to go through civil enforcement.[238]

The offence contemplated by the ALRC had the following features:[239]

- the use of a "system of conduct or pattern of behaviour" concept;
- the requirement that at least two … contraventions [of prescribed civil penalty provisions] have resulted; and
- the need to prove the particular fault elements.

The ALRC recommended such a model as it recognised that there is a "need to effectively design regulatory provisions that address contravening business systems and practices",[240] and that there is a clear role of systematic failures as a dimension of corporate misconduct.[241] Such offences draw upon the "system of conduct or pattern of behaviour" concept used in existing civil regulatory provisions.[242] Under this approach, a bank or financial institution would be evaluated against what it routinely and systematically does and what its systems are apt to produce.[243]

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[231] ALRC, n 5, 251 [6.126].

[232] ALRC, n 5, 234.

[233] Bant, n 26, 376.

[234] ALRC, n 5, 220.

[235] ALRC, n 5, 220.

[236] ALRC, n 5, 15 (Recommendation 8).

[237] ALRC, n 5, 15 (Recommendation 8).

[238] ALRC, n 5, 271 [7.9].

[239] Walpole and Corrigan, n 6. 511; ALRC, n 5, 270.

[240] ALRC, n 5, 271 [7.9], citing Jeannie Marie Paterson and Elise Bant, "Unfair, Unjust and Unconscionable Conduct in Consumer Contracting: Designing Effective Law Reform in Australia" (Conference Paper, Melbourne Law School Obligations Group Annual Conference, 5–6 December 2019).

[241] ALRC, n 5, 275.

[242] ALRC, n 5, 270.

[243] Bant, n 26, 383.

It is hoped that by taking such an approach in combination with other recommendations in the report, many low-level offences would be decriminalised and in the context of the recommendations as a whole, address concerns that civil penalties may be seen simply as "a cost of doing business" by corporations.[244] Such an approach recognises that in some instances only a criminal penalty will be a strong enough response to corporate malfeasance.[245]

It is also noted that the ALRC also initially proposed a much wider offence which would have criminalised the situation where a corporation contravened a civil penalty provision/s on multiple occasions than what it is now proposing under recommendation 8.[246] However, that proposal was criticised as being *unsound* as it challenged the "very distinction between civil and criminal liability",[247] and was too much of a widening of the scope of criminal liability.[248]

In addition, there were further proposed reforms that would have amended the *Corporations Act* to expand the situations in which officers of a corporation could have attracted individual criminal liability in instances of corporate criminal misconduct.[249] However, those proposals attracted significant criticism and were subsequently withdrawn.[250]

B. Proposed Model of Systems Intentionality

The proposed model of "systems intentionality", is designed to address the difficulty in ascertaining a corporation's state of mind.[251] It is said to be a methodology of imposing criminal liability on a corporation which can be more broadly applied as it operates by evaluating the corporate systems, policies, and patterns of "behaviour that result in criminal offending".[252]

The "systems intentionality" model proposes to sit alongside the current common law and statutory models and seeks to build on the concept of corporate culture.[253] It seeks to provide a practical, workable method of proving the required corporate mental states and to have the effect of operationalising the concept of a deficient corporate culture. It does this by aiding the concept of corporate culture to be more easily transferrable to the specific requirements of the law.[254] It requires no legislative intervention and is capable of being recognised and applied by the courts on the basis that it aligns with well-established principles of organisational liability and the extension of the concept of the corporate mind.[255]

It espouses the argument that it is a fact that a corporation does not possess a "natural or innate" state of mind and that corporate liability is not human liability simply transferred, but instead liability that is established to suit the reality of a corporation.[256] It seeks to do away with arguments that completely discount and dismiss corporate states of mind as being appropriate and instead holds the view that doing so would be difficult and disruptive.[257]

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[244] ALRC, n 5, 271 [7.11].

[245] ALRC, n 5, 271.

[246] ALRC, "Corporate Criminal Responsibility" (Discussion Paper No 87, 2019) 10 (*Discussion Paper*).

[247] TA Game SC and Justice David Hammerschlag, Submission No 17 to ALRC, *Corporate Criminal Responsibility* (2019) 2.

[248] ALRC, n 5, 295.

[249] *Discussion Paper*, n 246, 10 (Proposals 9, 10).

[250] ALRC, *Corporate Criminal Responsibility: Individual Liability for Corporate Misconduct – An Update* (2020).

[251] Bant and Paterson, n 24, 65.

[252] Walpole and Corrigan, n 6, 491; Bant and Paterson, n 24, 76.

[253] Bant, n 26, 378.

[254] Bant and Paterson, n 24, 78.

[255] Bant and Paterson, n 24, 78.

[256] Bant, n 26, 378.

[257] Bant, n 26, 378.

This model calls for a more rigorous and objective method that takes the corporate mind to be demonstrated through the corporation's systems, policies, and patterns of behaviour.[258] It is argued that the corporation's state of mind is established where it adapts a pattern of behaviour or a system of conduct that results in a contravention of the law, or is likely to, or even designed to, contravene some element of the law.[259] Such an approach involves an assessment of the inherent features of the design or the purpose of the system instead of any test of foreseeability from the perspective of a natural person in the process.[260]

The systems intentionality approach looks at what a corporation's systems objectively produce and what it systematically and routinely does to determine what the corporation, "knows, intends or is reckless towards."[261] The idea is that the system itself may reveal the culpable state of mind, in the intrinsic design of the corporation's systems, structures, or practices.[262] It focuses on the institutional aspects of the conduct by accepting that the corporation's business model itself could give rise to criminality.[263]

Such a methodology would account for decisions made by AI as it can be said that a corporation displays its intentionality through the systems it adopts and implements, including through automated and algorithmic processes as well as self-executing programs.[264] Systems intentionally treats systems, policies, and processes as where the corporate state of mind is found, that is the corporation's systems establish the corporation's state of mind.[265] In conclusion, those who advocate for this model argue that the concept of systems intentionality is a natural progression of how corporate criminal liability should be imposed on a corporation and is one that is both principled and which is already implicit in the law.[266] It is a model which appears well suited to a bank or financial institution, as they generally have systems, policies and processes in which such a corporate state of mind could be readily found.

VII. Conclusion

As can be seen above, the current state of Australian Law is that there are three ways in which corporate criminal liability may be imposed–an aggregate/identification approach at common law in the vein of *Meridian*, a modified version of vicarious liability as per the TPA Model, and the organisational fault model under Pt 2.5 of the *Criminal Code*.

These three approaches recognise that the traditional attributive models of corporate criminal liability at common law are inadequate to address the ever-evolving corporate criminal landscape. Those traditional attributive models were developed in the context of criminal liability being based on that of the individual and the inherent difficulties which arise from attempts to adapt the criminal law so that it applies effectively to corporations.

It is time to leave the past in the past and move on from the limitations of these traditional attributive approaches and adopt an approach that better reflects the nature of modern-day banks and financial institutions. While there have been attempts to do so to date, particularly in respect of Pt 2.5 of the *Criminal Code*, much more still needs to be done.

The imposition of fault on the actual bank or financial institution instead of an individual through a form of organisational liability is expected to motivate a holistic examination of the corporate culture and ethos. It is likely to be more effective in addressing systematic issues within the bank or financial

[258] Bant, n 26, 381.

[259] Bant, n 26, 382.

[260] Bant, n 26, 382.

[261] Bant, n 26, 383; Bant and Paterson, n 24, 77.

[262] Bant and Paterson, n 24, 80.

[263] Bant and Paterson, n 24, 84.

[264] Bant, n 26, 383.

[265] Bant, n 26, 383–384.

[266] Bant, n 26, 384.

institution, which lead to criminal conduct in the first place, instead of passing all the liability onto the relevant individual. The theory of organisational liability unearths an important concept which is that a corporate state of mind can be discerned through the ethos, personality, and culture of a company. Importantly, adopting organisational liability through the corporate culture model does not absolve individuals of liability for their own criminal conduct, but instead reflects the reality of the modern-day bank or financial institution.

Importantly, the attributive models are wholly insufficient when it comes to imposing liability on a bank or financial institution for criminal conduct which arises from an action by an automated process or the conduct of an AI as there is no individual from whom corporate criminal liability can be derived. The need to identify an individual so that criminal liability can attach is fundamentally at odds with how large, modern banks and financial institutions operate in practice.

To this end the reforms proposed by the ALRC and the proposed model of systems intentionality would go a long way to achieving these virtuous aims. In particular, the proposed model of systems intentionality is forward-focused and will be able to evolve and adapt over time to capture conduct that is *committed* by AI, to ensure that banks and financial institutions can be held to account for such conduct. This article is of the view that this is the most pressing concern for the future of holding banks and financial institutions criminally liable and ensuring that they take responsibility for their corporate actions, especially given the rate at which technology is advancing.

Notwithstanding the criticisms levelled against the theory of organisational liability, it is a practical method by which criminal liability can effectively and appropriately be imposed on a bank or financial institution. It is time to shift from the individual-centric models of corporate liability to that of an organisational-centric model so that banks and financial institutions can finally be *truly* held to criminal account for their behaviour.